Supreme Court of the United States

OCTOBER TERM, 1959

No. 229

CONTINENTAL GRAIN COMPANY,
Petitioner,

versus

BARGE FBL-585
and
FEDERAL BARGE LINES, INC.,
Respondents.

BRIEF FOR RESPONDENT.

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HAUSER PRINTING CO., INC., NEW ORLEANS

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INTRODUCTION

Respondent accepts the jurisdictional statement and generally accepts the "Statement of the Case" contained in petitioner's brief, but controverts petitioner's presentation of the issues involved as being too narrow.

STATUTE (AND RULE) INVOLVED

In addition to the statute cited as being the sole "Statute Involved" (28 U.S.C. 1404(a)), it is respondent's contention that Admiralty Rule 44 also serves as the basis for a District Court to exercise the power to order the transfer of an admiralty case. Rule 44 reads as follows:

> "In suits in admiralty in all cases not provided for by these rules or by statute, the District Courts

are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules."

QUESTION PRESENTED

The "Question Presented" as set forth in petitioner's brief is too limited in its context. This case, it is submitted, requires a consideration and determination of whether, it having been determined that the convenience of the parties and the speedy and efficient administration of justice requires such action,[1] a District Court may, on motion of the respondent, transfer an admiralty suit brought both *in personam* and *in rem* to another District wherein the *in personam* respondent was sueable, but from which the *res* had been removed prior to the filing of the libel.

Respondent shows that its original motion to transfer (R. 9) was not based solely on 28 U.S.C. 1404a, and that even though the District Court and the Court of Appeals below relied upon the statute as the sole authority for ordering the transfer, the source of the power to transfer may be found in the general admiralty practice and in Rule 44.

ARGUMENT

Feeling that we would be transgressing on the time of the Court if we were to repeat the arguments which have been made in brief and will be made orally in *Blaski* (No. 25) and *Behimer* (No. 26), our argument will be directed to the marked distinction between the instant admiralty case and those civil actions insofar as transfers are concerned. This distinction, we submit, is such that an affirmance of *Blaski* and *Behimer* will not

[1] Opinion of the District Court below (R. 19).

require a reversal here; their reversal, however, necessarily will lead to an affirmance here.

In this case, unlike in *Blaski* and *Behimer*, the alternative forum contemplated by the exact wording of Section 1404a was present and available to petitioner at the time the libel was filed: the *in personam* respondent was sueable in the transferee District, and unless the fact that *Barge 585* was removed from Memphis to New Orleans shortly after the occurrence of the incident giving rise to this litigation is held to be determinative of the problems presented, all requisites of Section 1404a were met.

It is to be noted that at the time the motion to transfer was presented to the District Court in New Orleans, there was pending in the United States District Court at Memphis a suit at law wherein Federal Barge Lines was seeking a recovery from Continental Grain for the damage sustained by its *Barge 585* through alleged improper loading. This suit by Continental Grain against Federal Barge Lines in New Orleans sought a recovery for the cargo on board *Barge 585* which had been damaged in the incident which gave rise to the Memphis litigation,[2] the first of the two actions.

It is quite obvious, we submit, that the finding of the District Court (R. 19) that the case requires transfer is correct.[3] Petitioner apparently recognizes the fact that the District Court's findings in this regard are not

[2] The questions raised by Judge Brown in the Court of Appeals below (Opinion, footnote 2, R. 43) concerning compulsory counterclaims, *res judicata*, and collateral or judicial estoppel, are not presently before the Court. A decision on these questions must await the determination of the forum which will ultimately try this case on the merits.

[3] "The efficient administration of justice requires that this claim for cargo damage be tried by the same Court which is trying the claim for hull damage, both claims being between the same parties and relate to the same incident" (Opinion of District Court, R. 19).

subject to challenge and no attack is made on those findings or, apparently, on the right of the Court to exercise its authority to transfer insofar as the *in personam* portion of the suit is concerned. Petitioner's argument is addressed solely to the proposition that the *in rem* portion of the suit could have been brought only in New Orleans, where the barge was physically located, and, the argument goes, the litigation may not be transferred to Memphis because Section 1404a requires the existence of alternative forums, which are non-existent here.

(1) *The District Court Has The Inherent Power To Order The Transfer*

It is submitted that the District Courts of the United States sitting as Courts of Admiralty do not require statutory authority to vest in them the power to order the transfer of admiralty cases on *forum non conveniens* grounds. We submit that the procedure in admiralty and maritime causes of action historically has been liberal, and has been developed in order to mete out justice in a speedy and efficient manner. The niceties of practice at common law have never been observed on the admiralty side of the docket of the District Courts.

The historical development of Admiralty third party practice prior to the adoption of General Admiralty Rule 56 is illustrative of the power of the District Courts. In the leading case of *The Hudson*, 15 Fed. 162 (1883), Judge Addison Brown, an eminent admiralty practitioner and jurist, had before him the question of whether or not, in the absence of any General Admiralty Rule, a third party could be vouched into litigation as a joint tort-feasor or party liable over. Likening the admiralty practice to the equity practice and relying in part on Justice Story's leading work on "Equity Pleading," he

found that the general rule of equity was that all parties interested in the subject matter of a controversy are necessary parties thereto, and held that logical and proper practice required the presence of all parties involved in a collision case, even though one or more of them had not been made a respondent in the libel. He pointed out that:

> "The court ought not to be liable, as a rule of practice, to be called on to try and determine actions of this character twice or thrice upon the facts, in as many independent suits. The testimony of the witnesses, moreover, whose lives are chiefly upon the sea, is often difficult to be procured. From their roving character, after a short time all trace of them is often lost, and a subsequent suit for contribution involving the trial of the whole question of liability *de novo* would have little chance of justice through the probable loss of material evidence on the one side or the other. * * *
>
> "And even if the remedy against the other vessel, or her owners, for contribution, were still available, and the same witnesses were still procurable, the liability to perversions of the truth in any subsequent suit after the decision of the court had once been made known upon the facts of the case, would be so great, considering the witnesses in such cases; the difficulties of the trial would be so greatly increased through the varying testimony; and contrary judgments as to the same collision would sometimes be so unavoidable, that the result of the practice of admitting successive independent suits concerning the same collision could hardly fail to discredit the administration of justice." 15 Fed. 162, 169.

The decision in this case was the basis for other Courts finding authority to extend the principle laid down by Judge Brown. It also served as the basis for

Admiralty Rule 59, which was promulgated by Your Honors in 1883, but was limited to collision cases. It was not until 1920 that old Admiralty Rule 59 became the present Rule 56 and authorized third party practice in admiralty cases other than collision actions. In the interim between 1883 and 1920, *Benedict on Admiralty* (6th ed., 1940) Vol. 2, § 349, Page 534, Note 24, cites twenty-one non-collision cases where the Courts applied the third party practice authorized by the old 59th Rule by analogy to cases other than those involving collisions.

The history of the Rule is given and the matter is discussed in the opinion of Mr. Justice Clark in *British Transport Commission vs. United States (The Haiti Victory—Duke of York)* 354 U.S. 129, 77 S. Ct. 1103 (1957), where, in summarizing the history of the present 56th Rule, Mr. Justice Clark pointed out that:

> "* * * the Rules were not promulgated as technicalities restricting the parties as well as the admiralty court in the adjudication of relevant issues before it. There should therefore be no requirement that the facts of a case be tailored to fit the exact language of a rule." 354 U.S. 129, 136.

In that case, of course, the Court had before it for the first time the question of whether or not a party could be impleaded in a limitation of liability proceeding. The rationale of the decision, however, shows clearly the desire of Your Honors to require that the rights and liabilities of all parties be adjudicated in one single litigation rather than in scattered and piece-meal segments. The following quotation from the opinion, although referring to third party practice, is singularly apposite in the instant case:

> "Logic and efficient judicial administration require that recovery against all parties at fault is

as necessary to the claimants as is the fund which limited the liability of the initial petitioner. Otherwise this proceeding is but a 'water haul' for the claimants, a result completely out of character in admiralty practice. Furthermore, the Commission entered this proceeding voluntarily without compulsion. It filed an answer asking that justice be done regarding the subject matter, the collision; it denied all fault on its part and affirmatively sought to place all blame on the Haiti; it claimed damage in the sum of $1,500,000; and it contested the Haiti's claim of limitation or exoneration. In all of these respects judgment went against the Commission—it lost. Now having lost, it claims that the court has wholly lost jurisdiction while had it won, jurisdiction to enter judgment on all claims would have continued. It asserts that neither the Haiti, which was damaged to the extent of some $65,000, nor any of the other 115 claimants may prove their losses against it. But reason compels the conclusion that if the court had power to administer justice in the event the Commission had won, it should have like power when it lost. *Whether it is by analogy to Rule 56 or by virtue of Rule 44, or by admiralty's general rules heretofore promulgated by this Court, we hold it a necessary concomitant of jurisdiction in a factual situation such as this one that the Court have power to adjudicate all of the demands made and arising out of the same disaster. This too reflects the basic policy of the Federal Rules of Civil Procedure, 28 U.S.C.A. Admiralty practice which has served as the origin of much of our modern federal procedure, should not be tied to the mast of legal technicalities it has been the forerunner in eliminating from other federal practices.*" (Italics ours) 354 U.S. 133, 138.

There is no reason, we submit, why statutory authority must be invoked to apply the doctrine of transfers by

reason of *forum non conveniens* in admiralty. That power exists inherently in the Court by virtue of the historic practice, without the use of this Court's rule making power. This is demonstrated by Your Honors present Admiralty Rules 51 *et seq.*, dealing with Limitation of Liability and how it is claimed. Rule 54, which designates the Courts having cognizance of limited liability proceedings, particularly authorizes transfers and provides that:

> " * * * The District Court may, in its discretion, transfer the proceedings to any district for the convenience of the parties."

We submit there is no practical difference between an admiralty petition seeking limitation of liability and an admiralty suit seeking to impose a tort lien.

Admiralty Rule 44 clothes a District Court with complete and plenary authority to regulate its practice in such a manner as it deems expedient for the due administration of justice. Such a rule is an essential where the Court is dealing, for the most part, with a "*res*" which is "in transit" most of the time. Assume for example, a collision in a river which is the boundary between two states—a common situation on the Eastern seaboard as well as in the Mid-West where approximately fifteen states border on the Mississippi River and its major navigable tributaries. If a collision were to occur in the Hudson River at a point where it divides New York and New Jersey, and one of the vessels were to proceed to Manhattan and the other to Hoboken, where is venue to be found? Is one libel to be filed in New York and the other libel in New Jersey? Are the two cases to run parallel courses with duplicated testimony, but with possible opposite results? In these days of requiring form to be subservient to substance, such a rule

would be completely untenable and would be rejected summarily by Your Honors.

Nevertheless, admiralty has no counterpart of Rule 13a of the Federal Rules of Civil Procedure (the mandatory counterclaim Rule). We submit that an admiralty court could exercise the power conferred upon it by Rule 44 and direct the transfer and consolidation of the two actions in the hypothetical situation cited. That Rule, we submit, grants authority to the District Courts to transfer, consolidate, or take any other action directed to the prompt and efficient administration of justice. We therefore urge that Your Honors base your holding herein not on the narrow statutory ground that Section 1404(a) of the Judicial Code empowers a District Court to order a transfer on *forum non conveniens* grounds, but rather on the classic principle that pleading and practice in the admiralty courts is designed to be liberal and subservient to the paramount principle of those courts dispensing speedy and efficient justice.

(2) *The District Court Has The Power Under Section 1404(a) To Order The Transfer*

Even assuming, however, that the power to transfer does not exist in a District Court inherently, or result either expressly or impliedly from Rule 44, we nevertheless submit that transfers may be made under the direct authority of Section 1404(a) of the Judicial Code—and this, whether the libel be *in personam* or *in rem*.

Unlike the civil diversity jurisdiction of the District Courts of the United States,[4] no limitation on venue as to the "district of the plaintiffs" or the "district of

[4] Act of June 25, 1948, c. 646, 62 Stat. 935, 28 U.S.C. 1391.

the defendants" is present in an admiralty proceeding. It has been settled for many years that the District Courts, sitting as courts of admiralty, have jurisdiction over any cause cognizable in admiralty where the respondent is amenable to process, either in person or through the means of a foreign attachment.

> "* * * By the ancient and settled practice of courts of admiralty, a libel *in personam* may be maintained for any cause within their jurisdiction, wherever a monition can be served upon the libelee, or an attachment made of any personal property or credits of his; and this practice has been recognized and upheld by the rules and decisions of this court." (Citations of authority omitted). *In re Louisville Underwriters*, 134 U.S. 488, 10 S. Ct. 587 (1890).

The foregoing principle is carried into the Admiralty Rules in Rule 2, which authorizes the commencement of a suit *in personam* by "simple monition in the nature of a summons to appear and answer" or by the attachment of property in the hands of garnishees if the respondent is not found in the district.

We submit that there is nothing in the incidental fact that this claim was urged *in rem* against *Barge FBL-585* that militates against the transfer of this cause. After the filing of the libel, Federal gave petitioner a letter of undertaking in which it agreed to satisfy any decree which might be rendered against the barge. The giving of this letter created no new obligation on Federal. The effect of the letter was simply an agreement by Federal that it would do that which it could be forced to do if Continental were to obtain judgment in the *in personam* action and were to arm itself with process under the final decree and enforce execution. It is true, of course, that the undertaking provided that it was

given in lieu of a bond, and that the action should proceed as if *in rem* process had been issued and a formal surety bond had been posted. This procedure, however, is quite customary and may not be termed at all unusual.

As every proctor in admiralty knows, the classic jurisdictional statement in a libel *in rem* is that "the vessel now is, or, during the pendency of process herein, will be within the District and the jurisdiction of the Court".[5] However, many libels *in rem* are started and ended without a *res* in the form of the vessel being within the district.

> "* * * In other words, it is as possible to have a voluntary appearance of the res in a suit in rem when the res is outside of the territorial jurisdiction of the Court as it is to have a voluntary appearance in a suit in personam when the person is outside such jurisdiction." *J. K. Welding Co. vs. Gotham Marine Corporation*, 47 F. 2d 323, 335 (1931).

In that case, a motion was made to increase the amount of a claim propounded by a libel *in rem* after the filing of a stipulation for value, and to compel the giving of an additional or increased stipulation. Judge Woolsey reviewed the theory of bonding a vessel and pointed out that the inchoate lien of a maritime lien claimant ripens into a executory lien with the filing of a libel, but that the lien is discharged by the giving of the stipulation for value or a bond and the release from seizure of the vessel to her owner or claimant. He pointed out that:

> "The claimant is not a party in such a case except to the extent of his res, which is his stake in the litigation, and his signature to the stipulation for value does not submit him to the jurisdiction of

[5] *cf.* Admiralty Rule 22.

> the court to a greater extent, or subject him to liability for a greater amount, than that for which he stipulates to be liable. The court's jurisdiction is not personal over the claimant but in rem over the stipulation for value.
>
> * * * * *
>
> "A stipulation for value is an agreement with the court by the claimant involving the substitution by the claimant of a chose in action against himself—usually, of course, with joint stipulators for security's sake—as the res to take the place of the vessel or other property sued in rem." 47 F. 2d 332, 334, 335.

In *The Providence*, 293 Fed. 595 (1923), an objection was made by an impleaded party to the jurisdiction of the Court on the theory that the vessel proceeded against was not actually in the District and had never been seized. The claimant had appeared voluntarily and furnished a bond which the Court held was sufficient, saying:

> "It is the contention of Mugan, the pilot, that in order that this court may have jurisdiction it must appear that at the time of filing the libel and issuing the process the vessel was actually within this district, and that, as against him at least, no consent of parties can confer jurisdiction. It is not contended that an actual seizure is essential to give jurisdiction. It is conceded that this may be obviated by appearance and giving bond to the marshal, or by stipulation for value; but it is contended that the vessel must be within reach of the court's process. While it is required by admiralty rule 22 that there shall be an allegation 'that the property is within the district,' a res is not necessarily a vessel, and a stipulation for value, which is a substitute for the res, being now on file, I am of the opinion that, whatever force

there might have been in Pilot Mugan's objection to jurisdiction prior to the filing of the stipulation; the situation is materially changed by the fact that a substitute for the res is now within the control and subject to the disposition of the court, according to its finding of the merits of the cause of action." 293 Fed. 595, 596.

Benedict on Admiralty (6th ed., 1940) Vol. 2, § 242, Page 78 explains the proposition as follows:

> "* * * The District Court does not obtain jurisdiction if the property is attached or arrested outside the limits of the district, unless the claimant waives the irregularity of the property being outside the district. Thus if the claimant of the *res* files a general appearance and a claim and admits the allegation 'that the property is, or during the currency of process will be within the district,' the jurisdiction in the district where the libel *in rem* has been filed becomes complete in respect of the *res* and the parties. The fictitious allegation that the *res* is within the district, and the waiver of the irregularity by the claimant, enables parties to conduct suits *in rem* in any district satisfactory to them."[6]

We submit that *The Providence*, *supra*, and *The Yozgat*, 127 F. Supp. 446 (1954), directly support the proposition contended for and permit the voluntary appearance of the owner of a *res* proceeded against in a District where it is not present. In *The Yozgat*, Chief Judge Kirkpatrick indicated that jurisdiction *in rem* could be obtained by a stipulation and a deposit of a fund to the same extent as if a seizure had been effected; and in another case, arising out of the same factual situation, but involving different litigants, (*The Yozgat*, 112 F.

[6] *cf. The Frank Vanderkerchen*, 87 Fed. 763 (1898). In that case, the Court noted the practice prevailing even then in the New York district, to bond a claim before actual seizure. And note Judge Brown's opinion below (R. 46).

Supp. 933 (1953)), Judge Dimock in the Southern District of New York directly held that the practise was not improper even though the cargo proceeded against was physically located in Philadelphia rather than in New York. The respondent in the latter case contended that:

> "* * * since the cargo itself was not and never had been within the jurisdiction, the libel in rem must be dismissed and the freight that has been deposited by the cargo claimant must be returned to the claimant.
>
> "Taking this position, respondent ignores the practice of conferring jurisdiction upon a district convenient for the parties by admission of the court's jurisdiction on the part of the owner of the res and his placing in the jurisdiction of the court money, as in this case, or a stipulation for its value, as a substitute for the res." 112 F. Supp. 933, 934.

The decision of a ship owner or claimant to file a bond or stipulation for value for his vessel, even though the vessel is not present within the territorial jurisdiction and is not subject to seizure under the admiralty warrant, is, we presume, simply a consent to the venue of the Court. Conceptually, it does not matter whether it be so considered, or if it be considered as a waiver of the right to be sued at the place where the vessel may be found. It is our submission, however, that it is a necessity in cases of *in rem* jurisdiction where the *res* is transitory so to speak, and moves from district to district and, indeed, from country to country.

Whether the "consent" to the venue of a Court be given by the voluntary appearance of a claimant and the voluntary filing of a stipulation or bond for a vessel not then present, or whether the consent to be sued in a different venue be evidenced by a motion to transfer the

jurisdiction from the forum in which the suit is pending to a more convenient forum, involves, we submit, no difference in theory. The admiralty courts impose no sanction on a claimant who voluntarily submits to the jurisdiction of the court. Conferring jurisdiction where it would not otherwise exist in such a case is a common practice in the Admiralty, and bears no resemblance to those instances of litigants attempting improperly to confer jurisdiction on Courts. The nature of the Admiralty requires the practice. Owners with their home offices located in New York may not want to bring their counsel and their staffs to San Francisco or New Orleans; if collisions occur on the West Coast or in the Gulf, (or, indeed, on the high seas), litigation properly may be filed in the District Court of New York without fear of a charge of attempting improperly to confer upon that Court the power to determine the dispute between the parties.

No inference of contempt for the Rules of this Court and no disposition of the Admiralty Bar to disregard the law may be drawn from the practice. General Admiralty Rule 10 contemplates the commencement of an *in rem* action without the issuance of process, and under Section 2464 of Title 28 of the Judicial Code, a "general bond" may be filed to serve as a stay and assurance against seizure.[7] In other words, after a "general bond" has been given, the vessel may sail on her voyage and subsequent

[7] 28 U.S.C. § 2464, taken from the old Revised Statutes, § 941, provides in part:

> "The owner of any vessel may deliver to the marshal a bond or stipulation, with sufficient surety, to be approved by the judge of the district court, conditioned to answer the decree of such court in all or any cases that are brought thereafter in such court against the vessel. Thereupon the execution of all such process against such vessel shall be stayed so long as the amount secured by such bond or stipulation is at least double the aggregate amount claimed by libellants in such suits which are begun and pending against such vessel."

libels may be filed *in rem* to the same extent as if the ship were still present in port. Those libels are no less *in rem* because of the ship not being within the reach of process.

The rule is one of reason, generated by the fact that time is of the essence in shipping circles. A libel filed on a holiday or weekend may cost an owner thousands of dollars of detention before a bond can be made; or a libellant, knowing that a vessel has a quick turn-around schedule in port, may want to file his suit in advance of the ship's arrival to be certain that he can effect a seizure or procure a bond to secure his claim after the ship arrives. The rule accordingly serves both parties to the suit, depending on the situation.

As we have pointed out above, the consent to the jurisdiction of the Court is simply an easy and practical method of handling what could otherwise be a very expensive and time consuming practice. It is submitted that there is no reason why the hazard of an expensive shut-down of a ship, or of a claimant losing a chance to seize a ship should be run by litigants who could, by consent, agree in advance of the time the ship was due to arrive in port, that a bond for the value of the vessel would be given. Rules of practice, particularly in admiralty, are to make justice easily attainable, not to make the course of the law burdensome and difficult.

It is probably for the foregoing reasons that the only cases we have found in the narrow field under consideration are cases which favor the position taken by us. In *Torres vs. Walsh*, 221 F. 2d 319 (2d Cir. 1955), *cert. den.* 350 U.S. 836, 76 S. Ct. 72 (1955), Judge Medina for the Second Circuit squarely held that it was proper to order the transfer of an *in rem* case to another district on

motion of the respondent and over the objection of the libellant. In that case, a "longshoreman-seaman" injured aboard the *SS Rosario* in Puerto Rico, where practically all of the witnesses lived, brought suit in New York. In affirming the order of transfer, Judge Medina said:

> " * * * perhaps because District Judges sitting in admiralty here were thought to be more generous than those in Puerto Rico, this proceeding was commenced in the United States District Court for the Southern District of New York, where personal service of citation was made and a monition issued, pursuant to which the vessel was seized and released upon the filing of the usual undertaking. The claimant-respondent, perhaps also thinking the judges in Puerto Rico might award a less ample recovery, and relying on the obvious convenience of 'parties and witnesses,' moved under Section 1404(a) to transfer the case to Puerto Rico. This raised the question of whether an in rem proceeding in admiralty was within the scope of Section 1404(a), a matter of statutory interpretation, and also the question of whether the District Court in Puerto Rico would have power to proceed in rem. While it did appear that the vessel had frequently been in the territorial waters of Puerto Rico, it was equally clear that no attempt had been made to seize her there, and the only jurisdiction in rem was that of the District Court in New York.
>
> "The first question is whether the District Judge has exceeded his power under Section 1404(a), by transferring the case to a district where it might not have been commenced originally. Section 1404(a), it will be recalled, authorizes a transfer only 'to any other district or division where it might have been brought.' While in a sense it is true that an in rem proceeding might have been brought in Puerto Rico, as the vessel had been there from time to time, it may not be doubted

that the Congress intended no transfer in any case where the transferee court lacked competence to proceed. As a proceeding in admiralty has been held to be included in the phrase 'any civil action', it is probable that we would hold that the transfer of an in rem admiralty case to a court having no jurisdiction or power over the res was unauthorized, although the question is not entirely free from doubt. But we do not reach that question here as the respondent-claimant has agreed voluntarily to appear in the action in the District Court of Puerto Rico, there appears to be no difficulty on the score of venue, and the Judge granting the transfer has provided in his order that the transfer shall be effective only upon the filing of a bond or stipulation by the claimant of the SS ROSARIO to pay any judgment or decree recovered against the vessel. Accordingly, we conclude that there was no lack of power to make the order, as the District Court of Puerto Rico will be in effect a court where the action might have been brought." 221 F. 2d 320, 321.

The same holding was made in *Andino vs. The SS Claiborne*, 148 F. Supp. 701 (1957)[8] and *May vs. The Steel Navigator*, 152 F. Supp. 254 (1957), both out of the South-

[8] This case and the companion case of *Ayala vs. A. H. Bull SS Co.* 148 F. Supp. 703, arose in 1957 in the Southern District of New York. Both cases involved claims by longshoremen for injuries sustained in Puerto Rico. Both libellants thereafter moved to New York, and the cases are identical except for a difference in the times that the libellants established their alleged new residences in New York. We find nothing in the opinion to support the statement of petitioner (Brief, Page 7, footnote 4) that the vessel "was apparently not seized, nor (was) a letter of undertaking given, to perfect *in rem* jurisdiction". The same is true of the *May* case, *supra*, also referred to in the same footnote of petitioner's brief. In the *Andino* case, Judge Bryan held:

> "One further point must be considered. Respondent apparently does not do business in Puerto Rico and libelant could not have brought the action against it there in the first instance. However, respondent has not only consented that the action be transferred to Puerto Rico by making this motion, but expressly agrees that it will voluntarily appear there. This satisfies the requirements of Section 1404(a) that the District to which transfer is sought must be one where the action 'might have been brought'."

ern District of New York; and Judge Walsh in the District Court so held in the *Torres* case, 125 F. Supp. 496 (1954).

Internatio-Rotterdam Inc. vs. Thomsen, (The Karachi), 218 F. 2d 514 (1955), shows that the Fourth Circuit favors the view of the Second Circuit and the Fifth Circuit as exemplified in *Torres* case and the instant case when decided below. *The Karachi* involved a motion to transfer from New York to Maryland prior to the time that *in rem* process had been issued. Judge Parker, speaking for himself, Judge Soper and Judge Dobie, held that the Court had the power to transfer and reversed the holding of the Maryland District Court to the contrary. Although the case is distinguishable from the one at bar, it nevertheless indicates that philosophically the Fourth Circuit favors the application of the doctrine that an *in rem* suit may be transferred on the motion of the claimant.

It is to be noted that *The Jersbek*, 140 F. Supp. 851 (1956) relied upon heavily by petitioner, involved an attempt to force the claimant into the transferee jurisdiction. A transfer on motion of a claimant and a transfer on motion of a libellant are two different things. We do not here contend, and it is our submission that it would be error for a Court to hold, that a coercive transfer of a claimant to a different jurisdiction than that in which the suit was filed is proper. The concept of transferee jurisdiction is that there must be two available forums, and unless the moving party is the claimant, there is no secondary or transferee forum to which the case could be transferred. This situation is well pointed up in the footnote to Judge Parker's opinion in *The Karachi*, *supra*, for it would never do to permit a plaintiff to sue a defendant in the Court of the defendant's domicile and then move

to force the defendant to appear in a different jurisdiction. Thus the fear expressed by Judge Hand in *Foster-Milburn Co. vs. Knight*, 181 F. 2d 949 (2d Cir. 1950), that a California plaintiff might "fetch him (a New York defendant) 2,000 to 3,000 miles away for trial in a district where he does not live and where he has never set foot" has no application to the doctrine which we are invoking.

We hesitate here to open the question of the genesis of an *in rem* proceeding in admiralty and just how far the personification theory should be carried. For a very brief but compendious discussion of the growth of the American theory, we commend to the Court's attention the discussion contained in Gilmore & Black, *The Law of Admiralty*, (1st Ed., 1957) § 9-3, p. 483, *et seq.*

It may well be that the United States Courts have gone too far in pursuing the personification theory, and that the Courts fell into error through a failure of the earlier decisions to distinguish between a forfeiture (a true proceeding against the thing itself) and the exercise of jurisdiction *in rem* (where it might be, as is apparently held in England,[9] that the proceeding is only to force the appearance of the shipowner and secure payment of the claim). Even though it is impracticable in the present case to go too deeply into the theory of the fiction, we believe it would not be amiss to point out, as is said in Gilmore & Black, *supra:*

> "* * * But when a fiction has served out its time and purpose, its disappearance, even when it is as agreeable and harmless as the fiction of ship's personality, is always to be welcomed".[10]

In *Consumers Import Co. vs. Kabushiki Kaisha Ka-*

[9] *The Bold Buccleugh*, 7 Moore, P.C. 267, 13 Eng. Rep. 884 (1852); but see *The China*, 74 U.S. (7 Wall.) 53 (1868).

[10] Section 9-18, p. 510.

wasaki Zosenjo, 320 U.S. 249, 64 S. Ct. 15 (1943), suit was filed *in rem* against a ship and *in personam* against her operators for cargo damage arising out of a fire on board. The Fire Statute [11] was pled as a defense, but cargo urged that the Statute did not apply to an *in rem* claim and, on the contrary, served only to extinguish the maritime lien for the cargo damage. Relying to some extent on the *City of Norwich*, 118 U.S. 468, 6 S. Ct. 1150 (1886), Mr. Justice Jackson, for a unanimous Court, rejected the contention of the cargo interests saying in part:

> "* * * The Court (in the City of Norwich, discussed below) said that 'To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles.' The riddle after more than half a century repeated to us in different context does not appear to us to have improved with age. * * * Congress has said that the owner shall not 'answer for' this loss in question. Claimant says this means in effect that he shall answer only with his ship. But the owner would never answer for a loss except with his property, since execution against the body was not at any time in legislative contemplation. There could be no practical exoneration of the owner that did not at the same time exempt his property. If the owner by statute is told that he need not 'make good' to the shipper, how may we say that he shall give up his ship for that very purpose? It seems to us that Congress has, with the exception stated in the Act, extinguished fire claims as an incident of contracts of carriage, and that no fiction as to separate personality of the ship may revive them." 320 U.S. 249, 253.

The *City of Norwich*, *supra*, (one of the early cases

[11] 46 U.S.C. § 182, which relieves the owner of a vessel for liability for damage to property on board due to fire, unless caused by his design or neglect.

interpreting the Limitation of Liability Statutes), likewise covered the question of whether the Limitation Acts were applicable to an *in rem* claim against a ship. Mr. Justice Bradley held in that case:

> "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated, unless where, for public reasons, the law exempts particular kinds of property from seizure, such as the tools of a mechanic, the homestead of a family, etc." 118 U.S. 468, 503.

The opinion then quotes with approval from *Boyd vs. United States*, 116 U.S. 616, 637, 6 S. Ct. 524 (1886), as follows:

> "* * * Nor can we assent to the proposition that the proceeding [*in rem*] is not, in effect, a proceeding against the owner of the property as well as against the goods; for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited. In the words of a great Judge, 'Goods, as goods, cannot offend, forfeit, unlade, pay duties, or the like, but men whose goods they are.' Vaughan, C. J., in *Sheppard vs. Gosnold*, Vaughan 159, 172; approved by Ch. Baron Parker in *Mitchell vs. Torup*, Parker 227, 236."

Sacramento Navigation Co. vs. Salz, 273 U.S. 326, 47 S. Ct. 368 (1927) involved the question of whether or not a tug and a barge under common ownership were to be considered as one "vessel" for the purposes of the Harter Act. The contention was made that the bill of lading or shipping contract was for the barge alone, and implied a contract of towage rather than a contract of trans-

portation or affreightment. The Court answered the contention as follows:

> "The fact that we are dealing with vessels, which by a fiction of the law are invested with personality does not require us to disregard the actualities of the situation, * * *" 273 U.S. 326, 328.

Benedict deals with the point in the following manner:

> "The doctrine of the personality of the ship may be described as a fiction but the fiction is rather in the mode of expression than in the substance of the law. The principle is that one who has a contract, to which the ship is bound and which is breached, or who, through the instrumentality of the ship, has suffered a wrong that is within the maritime jurisdiction, shall have by way of security or redress, an enforceable interest in the ship." *Benedict on Admiralty* (6th Ed. 1940), Vol. 1, § 11, p. 17.

We submit that the foregoing authorities show clearly that the fiction of personifying the ship and thereby creating a lien thereon is for the purpose of providing security for a tort or a breach of contract cognizable in admiralty. The theory must stop somewhere, and although cases involving *in rem* claims may have to commence as if the ship were a personality, after a bond is posted, the case proceeds against the claimant who must defend and who must (*absent* security) pay any decree rendered against it. Accordingly, when Federal Barge Lines appeared and claimed its barge and furnished no security, even though it agreed in its undertaking that the litigation should proceed as if it had furnished a surety bond for the release of the barge, nevertheless the action became a personal action which it was defending, although on *in rem* principles. The *in rem* principles, however, are identical to the *in personam*

principles after a claim has been made and a bond filed, except in certain isolated instances, such as compulsory pilotage, which have no significance in the present context.

CONCLUSION

In summation, we submit that the District Courts of the United States sitting in Admiralty have plenary power, even without the aid of a statute and without authority from the Rules of this Court, to order the transfer of proceedings from one district to another. In the event that Your Honors should hold that such power does not exist inherently, then we submit that that power has been granted to the District Courts by Admiralty Rule 44. Finally, if Your Honors hold that Rule 44 has no application to this case, then the transfer should be permitted under Section 1404(a) of the Judicial Code for the reason that the consent of the claimant (or his waiver of his right not to be sued in the transferee jurisdiction) to an appearance in the transferee Court (the waiver or consent must be implied if it is not considered as expressed from the motion to transfer itself) satisfies the alternative venue requirement of the statute.

We submit that the decision in this case is not necessarily to be governed by the decisions in the companion cases of *Blaski* and *Behimer*. Reversal of those cases would necessarily require affirmance of the holding below, but affirmance would not necessarily entail a reversal here because of the additional grounds for the transfer afforded by Admiralty Rule 44 and the inherent power of a District Court sitting in admiralty.

For the reasons stated and because of the authorities cited, it is submitted that the decision of the United

States Court of Appeals for the Fifth Circuit is correct and should be affirmed, whether on identical or on other grounds.

Respectfully submitted,

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